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Arizona Department of Water Resources

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12 *Counsel for the United States*

13 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**  
14 **IN AND FOR THE COUNTY OF APACHE**

15  
16 IN RE: THE GENERAL  
17 ADJUDICATION OF ALL RIGHTS TO  
18 USE WATER IN THE LITTLE  
COLORADO RIVER SYSTEM AND  
SOURCE

CIVIL NO. 6417-300

**UNITED STATES' AMENDED  
STATEMENT OF CLAIMANT  
ON BEHALF OF THE NAVAJO  
NATION (PHASE II)**

19 CONTESTED CASE: In re Navajo Nation

20 HSR INVOLVED: Navajo Nation Reservation

21  
22 DESCRIPTIVE SUMMARY: Phase II Amended Statement of Claimant filed by the  
23 United States as trustee on behalf of the Navajo Nation concerning water rights for  
economic development.

24 NUMBER OF PAGES: 14

25 DATE OF FILING: Original transmitted to Arizona Department of Water Resources via  
26 Federal Express overnight delivery on October 7, 2020.

1 **I. INTRODUCTION**

2 In this subproceeding, the United States asserts claims for water rights on behalf of the  
3 Navajo Nation (“Nation”) and the beneficial owners of Reservation Allotments (“Reservation  
4 Allottees”) for that portion of the Navajo Reservation, including Reservation Allotments,  
5 located within the Little Colorado River Basin of Arizona (“LCRB” or “Basin”). For purposes  
6 of this subproceeding, the term “Navajo Reservation” includes land within the LCRB that the  
7 United States holds in trust for the Nation and land within Reservation Allotments, created  
8 pursuant to Section 1 of the General Allotment Act of 1887 and held in trust for the benefit of  
9 Reservation Allottees.<sup>1</sup> In this subproceeding, the United States, as trustee for the Nation,  
10 claims sufficient water to provide for the present and future uses to fulfill the purpose of the  
11 Navajo Reservation as a permanent home and abiding place for the Navajo people.  
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13 On December 28, 2016, this Court instructed the United States to begin the process of  
14 amending its water rights claims for the Nation in the LCRB.<sup>2</sup> The Court established three  
15 phases of litigation for the United States and Nation to amend and present its claims: Phase I –  
16 DCMI and Stock Watering Claims; Phase II – Economic Development Claims (*e.g.*, heavy  
17 industrial, mining, etc.), Cultural/Tribal Claims, and Environmental/Recreational Claims; and  
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22 <sup>1</sup> In the Special Master’s Minute Entry (July 2, 2019), the Court instructed water rights  
23 associated with Navajo Reservation Allotments would be retained in this case.

24 <sup>2</sup> *Order to File Amended Statements of Claimant and Order Requesting Technical Assistance*  
25 *from the Arizona Department of Water Resources* (Dec. 28, 2016) (December 2016 Scheduling  
26 Order) at 2.

1 Phase III – Irrigation Claims. Relevant here, the Court ordered the United States to amend its  
2 statement of claimant (“SOC”) for those claims associated with Phase II by October 7, 2020.<sup>3</sup>

3 Accordingly, through this filing, the United States amends its SOC and states its Phase  
4 II claims. Specifically, and as more fully set forth below, the United States, consistent with the  
5 homeland standard embraced by the Arizona Supreme Court<sup>4</sup> and this Court, asserts water  
6 right claims for potential, feasible economic development on the Navajo Reservation. The  
7 claims set forth herein conform to the most recent and updated information available to the  
8 United States. The Nation is asserting other claims consistent with the homeland standard in  
9 this subproceeding, and nothing herein should be construed as the United States’ disagreeing  
10 with or objecting to claims made by the Nation. Further, the claims in this amended SOC are  
11 also submitted pursuant to the guidance provided by A.R.S. §§ 45-183 and 45-254 as  
12 interpreted by the Arizona Supreme Court to apply to federal reserved water right claims on  
13 Indian reservations.<sup>5</sup> This includes the right to amend claims prior to the conclusion of  
14 hearings by the Special Master in this subproceeding<sup>6</sup> by filing an amended SOC with the  
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18 <sup>3</sup> *Order Granting Navajo Nation's Motion to Extend Deadline to File Amended Statement of*  
19 *Claimant and Vacating Oral Argument* (May 29, 2020).

20 <sup>4</sup> *In re the General Adjudication of All Rights to Use Water in the Gila River System and*  
21 *Source*, 201 Ariz. 307, 313, 35 P.3d 68, 74 (2001) (“*Gila V*”).

22 <sup>5</sup> *United States v. Superior Court in and for Supior Cty*, 697 P.2d 658, 671 (Ariz. 1985) (“Since  
23 federal law is supreme, it follows that claims based on rights granted by federal law, including  
24 the *Winters* doctrine, will be sufficient under the statute even though the information provided  
does not include that required to support claims based on state law. Also, see A.R.S. § 45-254  
(C), requiring only such information as is ‘appropriate.’”).

25 <sup>6</sup> See *San Carlos Apache Tribe v. Superior Court*, 193 Ariz. 195, 972 P.2d 179 (1999).  
26

1 Director of the Arizona Department of Water Resources (“ADWR”) and a notice of filing with  
2 the Court.<sup>7</sup>

3 **II. LANDS SUBJECT TO THIS AMENDED STATEMENT OF CLAIMANT**

4 The Navajo people have lived in the LCRB since time-immemorial and were well-  
5 established as a dynamic and adaptive hunting, gathering, agricultural, and trading people of  
6 the LCRB well before the United States secured the area from Mexico through the Treaty of  
7 Guadalupe Hidalgo in 1848.<sup>8</sup> Since 1848, through treaty, statute, and administrative action, the  
8 United States has consistently taken action on behalf of the Nation and over the course of time  
9 has acquired approximately 5.6 million acres of land, which it holds in trust for the Nation’s  
10 benefit. Previously, the United States provided a map of the Navajo Reservation that lies  
11 within the LCRB. In addition, the United States identified the locations of the 76 Reservation  
12 Allotments situated within the Navajo Reservation and held in trust by the United States for the  
13 benefit of individual Indians.<sup>9</sup> The United States incorporates this information by reference  
14 here.  
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21 <sup>7</sup> A.R.S. § 45-254 (E)(2).

22 <sup>8</sup> 9 Stat. 922 (1848 Treaty of Guadalupe Hidalgo).

23 <sup>9</sup> See *United States’ Second Amended Statement of Claimant on Behalf of the Navajo Nation -*  
24 *Update Re: Inclusion of Reservation Allotments* (Mar. 31, 2020); see also *United States’*  
25 *Errata and Update to January 10, 2020 Updated Report on Allotments* (Jan. 17, 2020); and  
26 *United States’ Update to January 10, 2020 Updated Report on Allotments* (Mar. 10, 2020).

1     **III.   LEGAL BASIS FOR WATER RIGHT CLAIMS WITHIN THE NAVAJO**  
2     **RESERVATION**

3         Soon after first establishing its sovereignty over the territory comprising the modern  
4     states of New Mexico and Arizona through the Treaty of Guadalupe Hidalgo, the United States  
5     concluded a Treaty of Peace with the Nation in 1849. In the Treaty of Peace, the United States  
6     promised to establish the boundaries of the Navajo Reservation to secure peace between the  
7     Nation and non-Indians.<sup>10</sup> Through a subsequent treaty, executive orders, statutes, and agency  
8     actions, the United States carried out its obligations under the Treaty of Peace to establish the  
9     Navajo Reservation in its present form.

10        The basis for the United States' claims on behalf of the Nation is the federal Indian  
11     reserved water rights doctrine. In *Winters v. United States*, 207 U.S. 564 (1908), the Court held  
12     that the establishment of an Indian reservation impliedly reserved the amount of water  
13     necessary to fulfill the reservation's purposes, including present and future needs.<sup>11</sup> The  
14     *Winters* Doctrine includes water rights to support historic uses that Indian tribes enjoyed  
15     aboriginally and never ceded as well as water rights to support additional purposes for which  
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21     <sup>10</sup> 9 Stat. 947 (1849 Navajo Treaty of Peace).

22     <sup>11</sup> *Id.*, at 576-77 (water was reserved to support the "purpose of the agreement" establishing the  
23     reservation and those purposes "would be necessarily continued through years"). *See also*  
24     *Arizona v. California (Arizona I)*, 373 U.S. 546, 598, 600-01, 605 (interpreting *Winters*  
25     Doctrine as reserving water sufficient to satisfy present and future needs of a reservation as a  
26     liveable homeland); *Colville Confederated Tribes v. Walton (Walton II)*, 647 F.2d 42, 47 (9th  
   Cir. 1981) (water reserved to provide a home for Indians).

1 the reservation was established.<sup>12</sup> The Supreme Court's long-embrace of the implied reserved  
2 water right remains consistent, undisturbed and strong.<sup>13</sup>

3 The Arizona Supreme Court has fully embraced the legal principles articulated by the  
4 U.S. Supreme Court recognizing the basis for the existence and quantification of these reserved  
5 rights.<sup>14</sup> The court has succinctly articulated that "the essential purpose of Indian reservations  
6 is to provide Native American people with a 'permanent home and abiding place.'"<sup>15</sup>  
7 Accordingly, the United States claims sufficient water to provide for the present and future  
8 uses to fulfill the purpose of the Navajo Reservation as a permanent home and abiding place  
9 for the Navajo people. Consistent with *Gila V*, the United States' claims take into consideration  
10 the Nation's culture; geography, topography, and natural resources of the Navajo Reservation;  
11 tribal economic base and infrastructure including raw materials, financial resources and human  
12 resources; past tribal water use; and present and projected future population.<sup>16</sup>  
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17 <sup>12</sup> *Winters*, 207 U.S. at 577 ("The power of the government to reserve the waters and exempt  
18 them from appropriation under the state laws is not denied, and could not be." citing *United*  
19 *States v. Winans*, 198 U.S. 371, 381 (1905), (an Indian Tribe retains all rights not expressly  
20 granted from them); see also *United States v. Ahtanum Irrigation Dist.*, 236 F.2d 321 (9th Cir.  
1956), cert. denied, 352 U.S. 988 (1957) (recognizing Indians' right to use water based on their  
right of use and occupancy).

21 <sup>13</sup> See generally *Winters* and *Arizona v. California*, 373 U.S. 546 (1963) (*Arizona I*) (applying  
the federal reserved water right doctrine to Indian reservations).

22 <sup>14</sup> *Gila V*, 201 Ariz. at 310-12, 35 P.3d at 71-73.

23 <sup>15</sup> *Id.* 201 Ariz. at 313, 35 P.3d at 74 (quoting *Winters*, 207 U.S. at 565).

24 <sup>16</sup> *Id.* 201 Ariz. at 318-19, 35 P.3d at 79-80; see also COHEN'S HANDBOOK OF FEDERAL INDIAN  
25 LAW § 19.03[4], at 1217 (recognizing broader homeland purpose of reservations).  
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1 **IV. PRIORITY DATE**<sup>17</sup>

2 The Navajo Reservation is located within the Nation's aboriginal territory within the  
3 LCRB. Since time immemorial, Navajo Indians have made the Basin their permanent home.  
4 Navajos have engaged in activities ranging from hunting and gathering resources native to the  
5 land, to engaging in ancient agricultural practices, to raising livestock, to engaging in economic  
6 trade/commerce, to embracing modern agricultural and industrial practices. Broadly speaking,  
7 Navajos within the LCRB have consistently, and without interruption over centuries, used  
8 water in the LCRB to meet all of their domestic, cultural, ceremonial, and economic needs.  
9

10 As discussed above, the United States first encountered the Nation in the mid-19<sup>th</sup>  
11 Century and established a long-lasting government-to-government relationship with the Nation  
12 through the 1849 Treaty of Peace. Nothing about this adjudication should limit the Nation's  
13 right to use water in the LCRB as it has since time immemorial—to support themselves by  
14 whatever means available in their ancestral homeland. Based on the Nation's aboriginal  
15 occupation of the Basin and use of the waters from the Basin, the United States claims on  
16 behalf of the Nation and for Reservation Allotments a priority date of time immemorial for all  
17 water right claims on the Navajo Reservation.<sup>18</sup> In the alternative, the United States claims a  
18 priority of July 1, 1849, for all lands now reserved for the Nation and Reservation Allotments;  
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21 <sup>17</sup> The United States acknowledges that beginning in 2008, the parties to the LCR Adjudication  
22 participated in a contested case entitled *In re Hopi Tribe Priority* (Hopi Priority Case). *See*  
23 *Case Initiation Order and Designation of Issues for Briefing*, CV 6417-201 (Sept. 8, 2008).  
24 The United States respectfully disagrees with the Court's legal conclusions from the Hopi  
Priority Case but recognizes that it may have some application to this Navajo Reservation  
subproceeding.

25 <sup>18</sup> *United States v. Winans*, 198 U.S. 371, 381 (1905); *Winters*, 207 U.S. at 576-77.  
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1 this date corresponds to the date on which the United States first secured peace with the  
2 Nation, promised the Nation that a reservation would be established, and put all on notice that  
3 a reservation would be established from the aboriginal lands of the Nation wherever they might  
4 ultimately lie.<sup>19</sup>

5 **V. AMENDED WATER RIGHT CLAIMS FOR PHASE II WATER USE**  
6 **CATEGORIES WITHIN THE NAVAJO RESERVATION**

7 Consistent with the Court's scheduling orders, the United States amends its amended  
8 SOC for potential, feasible economic development within the Navajo Reservation.

9 The United States has engaged technical expertise to identify potential, feasible  
10 economic development that can be anticipated to occur on the Navajo Reservation. The Nation  
11 has substantial natural resources (including water resources) and human resources available to  
12 develop its economy to allow the Nation's members to live, survive, and thrive on the  
13 Reservation. With these substantial resources, the Nation can commit its political,  
14 administrative, and financial resources and attract the investment of others to develop  
15 significant economic development projects within the Navajo Reservation. Only through such  
16 potential, feasible economic development can the Nation hope to ensure that its Reservation is  
17 and remains a permanent homeland for future generations.<sup>20</sup>  
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22 <sup>19</sup> *State of New Mexico, ex rel. Martinez v. Lewis*, 861 P.2d 235, 244 (N.M. Ct. App. 1993); *see*  
23 *also*, 9 Stat. 947 (Navajo Treaty of Peace, 1849).

24 <sup>20</sup> Moreover, to support the United States' economic development claims on behalf of the  
25 Navajo Nation, which are based on the Nation's future needs, the United States may—where  
26 and when appropriate—present some evidence of the Nation's historic or current water use  
activities.



1           The United States has identified numerous feasible economic development  
2 opportunities that the Nation could pursue. These projects include power generation as well as  
3 natural resource extraction and processing. Each project identified would need its own water  
4 source to be achieved and would involve a quantity of water that exceeds what could/would be  
5 supplied by a municipal system. Thus, such potential projects would be in excess to that water  
6 reserved for DCMI purposes that are the subject of Phase I litigation.

7           Taking into consideration the potential, feasible economic development projects that  
8 the United States has identified and that would support the homeland purpose of the Navajo  
9 Reservation, the Nation is entitled to a recognized water right with the following attributes that  
10 are in addition to the time-immemorial priority articulated above.<sup>21</sup>  
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17 <sup>21</sup> It is the United States' position that claimants of federal reserved water rights on the Navajo  
18 Reservation must establish no more than the basic elements of a water right to have such rights  
19 decreed in this adjudication — including, the aggregate quantity necessary for each category of  
20 use on the Reservation, the source of water being from either surface or groundwater (or both),  
21 and priority date. Further, for other elements such as points of diversion and place of use, the  
22 United States need specify no more than that the diversion/use occurs or will occur within the  
23 Navajo Reservation. *See United States' Motion for Partial Summary Judgment on the*  
24 *Attributes Required to Establish an Indian Reservation's Federal Reserved Water Rights, In*  
25 *re Hopi Reservation HSR* (CV 6417-203) (Jan. 29, 2020). The United States disagrees with the  
26 Special Master's *Order Denying United States' Motion for Partial Summary Judgment on the*  
*Attributes Required to Establish an Indian Reservation's Federal Reserved Water Rights and*  
*Order Granting in Part and Denying in Part the LCR Coalition's Motion for Entry of Order*  
*Regarding the Attributes Necessary for Adjudication of Federal Reserved Water Rights* (CV  
6417-203) (June 29, 2020) ("Order"), to the extent the Order is contrary to the United States'  
position.

- 1        **Water Source** – available groundwater on or under the Navajo Reservation
- 2        **Place of Use** – the Navajo Reservation (specifically, those areas within the Reservation
- 3        that ultimately prove to be the most feasible to achieve potential economic
- 4        development)
- 5        **Purpose of Use** – Economic Development
- 6        **Point of Diversion** – the Navajo Reservation (specifically, those points that ultimately
- 7        prove to be the most feasible to achieve potential economic development)
- 8        **Quantity of Water** – 17,890 acre-feet per year (“AFY”)

9        The potential, feasible economic development projects that support this amended SOC

10       are summarized in the table below. Throughout the course of this litigation, the United States

11       has and will continue to review and consider these and additional economic development

12       projects that support the water right claim articulated herein. To the extent that the United

13       States refines its water right claim based on additional investigation, the United States will

14       amend this amended SOC accordingly.

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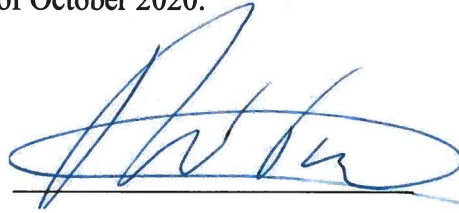
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Economic Development Project	Description	Water Needs (AFY)	Water Source	Project Location
Surface Mine – Coal Extraction	7.5 million ton annually to supply CGL plant	780	Available Groundwater	Resource Dependent, Black Mesa Area, Navajo Reservation
Coal to Gasification / Liquefaction	Using coal from mine to turn into diesel fuel	3,800	Available Groundwater	Resource Dependent, Black Mesa Area, Navajo Reservation.
Coal-Fire Power Generation	1,800 MW mine-mouth generation plant using pulverized coal	6,500	Available Groundwater	Resource Dependent, Black Mesa Area, Navajo Reservation
Natural Gas Combined Cycle Power Generation	500 MW generation plant using natural gas (wet recirculating cooling system)	2,930	Available Groundwater	Southern-half Navajo Reservation
Concentrated Solar Power Generation	Power production using CSP (wet cooling system)	2,440	Available Groundwater	Resource Dependent, Southern-half Navajo Reservation
Forest Product Manufacturing	Log yard watering, along with sawmill and boiler system	650	Available Groundwater	Resource Dependent, Southern-half Navajo Reservation
Coal Bed Methane Extraction	Produced water from Dakota Sandstone formation	780	Available Groundwater	Resource Dependent, Southern-half Navajo Reservation
Helium Extraction	Produced water from helium wells in Pinta Dome and Navajo Springs Field	10	Available Groundwater	Resource Dependent, Southern-half Navajo Reservation

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2 Respectfully submitted this 7th day of October 2020.  
3  
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Attorneys for the United States

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Christyline Banet

Subscribed and sworn before me this 6<sup>th</sup> day of October, 2020 by Christopher Banet



My Commission expires: 6/01/2022



**CERTIFICATE OF SERVICE**

I hereby declare under penalty of perjury, that on October 7, 2020, I served a true and correct copy of the UNITED STATES' AMENDED STATEMENT OF CLAIMANT ON BEHALF OF THE NAVAJO NATION, by Federal Express overnight delivery to the Arizona Department of Water Resources at the following address:

Thomas Buschatzke  
Director  
Arizona Department of Water Resources  
1110 W. Washington Street, Ste. 310  
Phoenix, AZ 85007

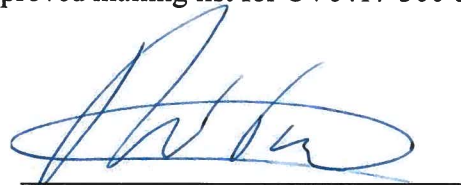
In addition, on October 7, 2020, I served a courtesy copy of the UNITED STATES' AMENDED STATEMENT OF CLAIMANT ON BEHALF OF THE NAVAJO NATION, via Federal Express overnight delivery on the following addresses:

Clerk of the Superior Court  
Apache County  
Attn: Water Case  
70 West Third South  
St. John's, AZ 85936

Susan Ward Harris  
Special Master  
Central Court Building, Ste 3A  
201 West Jefferson  
Phoenix, AZ 85003-2205

Hon. Mark H. Brain  
Judge of the Superior Court, Maricopa  
County  
East Court Building, Suite 413  
101 West Jefferson  
Phoenix, AZ 85003

In addition, on October 7, 2020, I served a courtesy copy of the UNITED STATES' AMENDED STATEMENT OF CLAIMANT ON BEHALF OF THE NAVAJO NATION, via First Class U.S. Mail to all persons on the court-approved mailing list for CV6417-300 dated August 26, 2020



Guss Guarino